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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

B.I.P CORPORATION, PLAINTIFF, V. MITEC TELECOM, INC., AND DOES 1 TO 30, DEFENDANT.	Case No. 3:08-cv-313 B.I.P. CORPORATION'S OPPOSITION TO DISMISS ITS SECOND AMENDED COMPLAINT AGAINST MITEC TELECOM, INC. Date: August 11, 2008 Time: 10:30 am Place: Courtroom 13 Judge: Marilyn L. Huff

TABLE OF AUTHORITIES

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I. INTRODUCTION

Among other things Defendant is a manufacturer of high power transceivers. Plaintiff is a distributor of telecommunications equipment and was purchasing transceivers exclusively from defendant. Before any purchases were made the parties entered into a non-disclosure agreement and also a “bill and hold agreement. ” Among other things the parties agreed that plaintiff would provide defendant with the names and addresses of its customers that regularly purchased high powered transceivers for direct shipment from defendant’s warehouse, but defendant was required to keep that information secret and had agreed not use it for its own use. The bill and hold agreement required that defendant warrant and repair or replace defective equipment.

At some point in time defendant commenced soliciting sales directly from plaintiff’s customers and at some point in time defendant knowingly started shipping out defective product. Plaintiff requested all transceivers be tested and repaired before any more shipments were made and also demanded defendant cease contacting its customers. Defendant asked plaintiff provide a complete list of its customers, so that it would know what customers not to contact. At least three natural persons acting on behalf of defendant promised the defective product in its warehouse had been tested and repaired. Shipping of the product resumed, but the high failure rate continued. In order to gain a competitive advantage defendant then sought out sales by informing plaintiff’s customers that plaintiff’s product were not warranted, and by offering lower prices to plaintiff’s customers than to plaintiff.

II. MEMORANDUM OF POINTS AND AUTHORITIES

A. PLAINTIFF HAS IDENTIFIED THE NON DISCLOSURE AGREEMENT WITH SUFFICIENT PARTICULARITY AND THEREFORE DEFENDANT’S MOTION TO DISMISS PLAINTIFF’S CLAIM FOR MISAPPROPRIATION OF TRADE SECRETS SHOULD BE DENIED

The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. *Gilligan v. Jamco Develop. Corp.*, 108 F3d. 246, 249 (9th Cir. 1997). The reviewing court considers only the contents of the complaint and construes all allegations of material fact in the light most favorable to the nonmoving party. *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir.1996); *Allarcom Pay Television, Ltd. v. General Instrument Corp.*, 69 F.3d 381, 385 (9th Cir.1995). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *Parks Sch. of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir.1995). No matter how improbable the facts alleged are, they must be accepted as true for purposes of the motion. *Neitzke v. Williams*, 490 US 319, 109 S.Ct 1827 (1989).

In the instant matter defendant concedes that pursuant to California Civil Code § 3426.1(b) a claim for misappropriation of trade secrets requires two elements (1) the existence of a trade secret and (2) misappropriation of the trade secret. Plaintiff has properly pled that there was a trade secret and that the trade secret was misappropriated. In its complaint plaintiff specifically alleges that it had a customer list and that it protected its customer list through the use of non-disclosure written agreements. (Second amended complaint, ¶¶ 8-13, 27-32). Plaintiff has properly pled that defendant knowingly and intentionally misappropriated plaintiff's customer list. (Second amended complaint ¶¶ see 32-39). Defendant then argues that plaintiff has failed to state what defendant agreed to, but plaintiff's complaint clearly states that it entered into a confidentiality agreement where plaintiff's customer information would not be used by defendant for its own personal use. (Second amended complaint ¶¶ 10, 11).

Defendant argues that bare bones allegations are insufficient, but contrary to defendant's argument challenges to a bare bones pleadings are doomed with respect to an attack based on a failure to state a claim. *Colle v. Brazos County, Tex.*, 981 F.2d 237 (C.A.5 (Tex.), 1993). Defendant then argues that plaintiff's claims are based entirely on unsupported and warranted conclusions that it possessed a valid trade secret. Once again defendant for some reason or other chooses to ignore the facts pleaded in plaintiff's complaint. Plaintiff specifically states that it entered into a written non disclosure agreement with defendant and whereby defendant has agreed to refrain from using any information plaintiff provides for its own personal. (Second amended complaint (¶¶ 9,10, 11). The complaint clearly states that is covers any information pertaining to customers. Defendant then argues that plaintiff fails to show how it ensured that employees or anyone else would not disclose or provide the customer list to others, such an assertion is irrational. Plaintiff could not possibly ensure that the information would not be disclosed to others, what plaintiff could do is take to steps to protect its customer list, which it did by requiring non disclosure agreements (Second amended complaint ¶ 8, 28, 29).

Defendant further argues that specifying what steps plaintiff took to protect its customer list is insufficient to remedy its prior pleadings, but fails to state why. In a Rule 12(b)(6) motion to dismiss the court must decide whether the facts alleged, if true, would entitle plaintiff to some form of a legal remedy. Unless the answer is unequivocally "no," the motion must be denied. *Conley v. Gibson*, 355 U.S.41, 78 S.Ct. 99 (1957); *De La Cruz v. Tormey*, 582 F2d 45 (1978). In the instant matter the plaintiff has alleged sufficient facts, which if true, would entitle plaintiff to some form of a legal remedy. Defendant then cites *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st cir. 1996), but fails to show how plaintiff's assertion of written non-disclosure agreements with defendant and others are bald assertions, unsupportable conclusions, periphrastic circumlocutions or the like.

Defendant's rule 12(b)(6) motion must be viewed with disfavor. The motion to dismiss for failure to state a claim is viewed with disfavor and rarely granted. See *Gilligan v. Jamco Develop. Corp.*, 108 F3d. 246, 249 (9th Cir. 1997); *Colle v. Brazos County Texas*, 981 F2d 237,243 (th Cir. 1993). In the instant matter it would be improper to dismiss because a 12(b)(6) dismissal is proper only in extraordinary cases. See *United States v. Redwood City*, 640 F.2d. 963, 96 (9th Cir. 1981); *Cauchi v. Brown*, 51 F.Supp.2d 1014 (ED CA 1999); *United States v. White*, 893 F.Supp. 1423 (CD CA 1995).

Plaintiff's complaint should not be dismissed, because it does not appear beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *Parks Sch. of*

Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir.1995). No matter how improbable the facts alleged are, they must be accepted as true for purposes of the motion and therefore defendant's complaint that documents are not attached is an insufficient basis to grant defendant's motion to dismiss, the facts must be accepted as alleged. *Neitzke v. Williams*, 490 US 319, 109 S.Ct 1827 (1989).

B. PLAINTIFF'S CLAIM FOR FRAUD SHOULD NOT BE DISMISSED, PLAINTIFF HAS PLED A "BARE BONES"DESCRIPTION OF THE NON DISCLOSURE AGREEMENT AND THE BILL AND HOLD AGREEMENT; AND WHETHER OR NOT SOMETHING HAS BEEN TESTED AND REPAIRED IS NOT SUBJECT TO INTERPRETATION, IT EITHER HAS BEEN TESTED AND REPAIRED OR IT HAS NOT.

There is no disagreement that a claim for fraud is subject to a heightened standard and that it involves alleging the elements of the claim with particularity, defendant does not complain that plaintiff has failed to meet the standard. Defendant argues that plaintiff's claim should be dismissed because the claim is based on the non-disclosure agreement entered into by the defendant and plaintiff which has not been described with sufficient particularity; and (2) because the alleged representations made by Mitec personnel are opinions.

Plaintiff has pled sufficient facts with particularity which identify each element with sufficient particularity. Plaintiff pled that defendant entered into a non confidentiality agreement and that defendant knew that customer information was confidential and then asked plaintiff provide a complete list of customers to refrain from competing with plaintiff's customers, but instead continued to misappropriate customer information. (Second Amended Complaint ¶¶ 8-12, 27-31, 36, 60). Plaintiff has pled that the confidentiality agreement was signed June 2, 2005 by Eric Gregoire and Al Hatset in the City of San Marcos. (Second Amended Complaint ¶ 9). Looking at the facts in the light most favorable it is clear that defendant had knowledge that all information pertaining to plaintiff's customers was to be kept confidential, but then knowingly and intentionally asked for a complete list of plaintiff's customers and proceeded to misappropriate plaintiff's customer list. (Second amended complaint ¶¶ 36-38, 48 page 10, 49 page 10).

Defendant's second argument that the representations made by defendant were merely opinions is irrational, either the product had been tested and repaired or not. If we take a car into a car repair shop do we really expect the repair person to state "in my opinion the alternator has been tested and repaired"? There is no opinion involved, at best it can be argued that a trier of fact would determine if defendant's statements were an opinion.

C. DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE OF PROSPECTIVE ECONOMIC ADVANTAGE SHOULD BE DENIED BECAUSE PLAINTIFF HAS SUFFICIENT IDENTIFIED THE NON DISCLOSURE AGREEMENT.

Defendant's sole argument is that plaintiff's claim is based on defendant's misappropriation of plaintiff's customer list and that plaintiff's claim for misappropriation of trade secrets must fail and therefore plaintiffs claim against defendant for intentional interference of prospective economic advantage must fail. Plaintiff has identified with sufficient particularity a non disclosure agreement which was signed by plaintiff and defendant on a specific date at a specific time, at a specific location, by specific natural persons.

D. DEFENDANTS MOTION TO DISMISS PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AND BREACH OF CONTRACT SHOULD BE DENIED BECAUSE PLAINTIFF HAS IDENTIFIED THE AGREEMENT WITH SUFFICIENT PARTICULARITY

Defendant argues that plaintiff has only set forth general allegations and that plaintiff does not specify in detail the full substance of the full agreement. This is clearly impractical as it would be too time consuming to describe in detail the entire agreement and would mean that plaintiff would necessarily have to attach a copy of such agreement in each and every instance. Further plaintiff's claim is not based on a breach of the entire agreement. Plaintiff specifically claims that the confidentiality agreement provided that defendant would refrain from misappropriating or using plaintiff's customer information for its own use. (Second amended complaint ¶¶ 9-12).

The "bill and hold agreement" provided for warranties that defendant would honor and plaintiff's claim is for breach of these warranties. (Second Amended Complaint 96, 101). Both agreements are identified by title, date, the natural persons that signed on behalf of the corporate entities and by the terms that were violated..

E. DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING SHOULD BE DENIED, BECAUSE PLAINTIFF'S CLAIM IS BASED ON CONTRACT NOT TORT

Plaintiff concedes that it is not entitle to recover in tort for its claim for breach of the implied covenant of good faith and fair dealing, and plaintiff does not at any point in time claim it seeks tort damages. Plaintiff is entitled to obtain the benefits of the contract.

III. CONCLUSION

Defendant's argument is almost all based on the fact that plaintiff did not attach copies of the non disclosure agreement and the bill and hold agreement. Plaintiff is not required to attach to the complaint the documents on which bases it's complaint and has identified the documents with sufficient particularity by specifying the title of the documents, the dates the documents were executed, the natural persons executing the documents, and the terms that were violated . If in these documents do not support plaintiff's claim then defendant may attach the documents to show that they do not support plaintiff's claim. *Bryant v. Avado Brands, Inc.*, 187 F3d 1271

(11th Cir. 1999).

Pleadings shall be so construed as to do justice. Fed.R.Civ.P. 8(e). At this stage any ambiguities in the documents must be resolved in plaintiff's favor, so if there is any ambiguity in the documents described it must be resolved in plaintiff's favor. *International Audio Text Network, Inc., v. AT&T Co.*, 62 F.3d 69, (2nd Cir. 1995); *Hearn v. R.J. Reynolds Tobacco Co.*, 279 F.Supp.2d 1096 (D AZ 2003). Instead of lavishing attention on the complaint until the plaintiff gets it just right, a district court should keep the case moving--if the claim is unclear, by requiring a more definite statement under Rule 12(e), and if the claim is clear but implausible, by inviting a motion for summary judgment. *Bennett v. Schmidt*, 153 F3d. 516 (7th Cir. 1998).

The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted and therefore defendant's motion should be denied. *Gilligan v. Jamco Develop. Corp.*, 108 F3d. 246, 249 (9th Cir. 1997). The reviewing court considers only the contents of the complaint and construes all allegations of material fact in the light most favorable to the nonmoving party, and by this standard clearly plaintiff has met its burden. *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir.1996); *Allarcom Pay Television, Ltd. v. General Instrument Corp*., 69 F.3d 381, 385 (9th Cir.1995). Looking at the complaint in the light most favorable to plaintiff, plaintiff has pled with sufficient particularity and defendant's motion to dismiss should be denied.

For these and all the above reasons, plaintiff respectfully requests defendant's motion be denied or in the alternate be permitted to make an amendment and attach the non-disclosure agreement and bill and hold agreement to the complaint.

Dated: July 24, 2008

/s/ *Arnold Hernandez*
Arnold Hernandez,
Attorney for plaintiff(s).

CERTIFICATE OF SERVICE

I, Arnold Hernandez, attorney for plaintiff B.I.P. Corporation, certify that on July 24, 2008, I caused PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT to be served through the electronic filing system on the following:

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/s / *Arnold Hernandez*
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